1975

Earl C. Freis v. Wheeler Machinery Company : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

EARL C. FREIS,

Plaintiff and Appellant,

vs.

WHEELER MACHINERY COMPANY,

Defendant and Respondent,

BRIEF OF THE APPELLANT

Appeal from the Judgment of the
Third District Court for Salt Lake County
Honorable James S. Sawaya, District Judge

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"R" refers to Record

"Tr." refers to Transcript

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

EARL C. FREIS,

Plaintiff and Appellant,

vs.

WHEELER MACHINERY COMPANY,

Defendant and Respondent.

Case No.

14184

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

This is an appeal from the judgment on a jury verdict in the Third Judicial District Court in and for Salt Lake County State of Utah, the Honorable James S. Sawaya, District Judge. The verdict returned and judgment thereon found no cause of action by plaintiff against defendant.

DISPOSITION IN LOWER COURT

The matter came on regularly for jury trial before the Honorable James S. Sawaya, District Judge, on May 1, 1975 and continued for a total of four days ending on May

6, 1975. At the close of the trial, the jury returned a verdict of no cause of action against the defendant, and judgment was duly entered by the trial court accordingly. Subsequently, plaintiff, by and through counsel, filed a Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial. Said Motion was denied by the trial court after hearing on May 23, 1975, and on June 18, 1975, plaintiff filed Notice of Appeal in this action, and the case is now before this Honorable Court pursuant to that Notice of Appeal.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the lower court's Verdict and Judgment, or in the Alternative for a New Trial.

STATEMENT OF FACTS

This action was brought to recover for personal injury sustained by plaintiff in a two-freight truck accident which occurred on U.S. Highway 89 at a point just north of the Junction 273 S.R. which is the old highway between Kaysville and Farmington where it crosses U.S. Highway 89. The accident occurred when the southbound tractor pulling a Peterbilt lowboy trailer loaded with a D-8 Caterpillar and a detached dozer blade driven by Rodney K. Bosch, defendant's driver, collided with the rear and left side of a Western Gillette truck-tractor pulling two trailers

under the control and operation of the plaintiff as an employee for Western Gillette. The plaintiff and the Western Gillette truck had been stalled behind traffic which had backed up following an accident at the above referred to Junction.

At trial, substantial credible and uncontroverted evidence was adduced by plaintiff, including testimony and admissions from defendant's driver, Rodney K. Bosch, together with Officer John Morton and Dave Lord, an accident reconstruction specialist and Exhibits provided by Howell Ujifusa, an expert photographer, all of which required a clear conclusion that the above described accident directly and proximately resulted from the negligence of defendant's driver, Rodney K. Bosch. Such evidence was not rebutted by the defendant. Further substantial credible and uncontroverted evidence was adduced by plaintiff showing that the injuries to plaintiff's cervical spine resulted from the said accident. Included was the testimony of Doctor Gary F. Larsen, plaintiff's treating physician, Doctor Thomas D. Noonan who independantly examined the plaintiff, Mr. James W. Dinger and Mr. Courtney Bluck who were co-drivers soon after the accident, and the plaintiff, Mr. Earl C. Freis. At the conclusion of the presentation of evidence in this case, plaintiff moved the trial court for a direct

verdict in favor of the plaintiff and against defendant. Said motion for directed verdict was denied with no explanation.

Subsequent to giving of the court's instructions, the jury retired for deliberation and later returned a verdict of no cause of action, and judgment was thereon was duly entered.

Subsequent to the entry of judgment, plaintiff timely moved the trial court, pursuant to their provisions of rules 50(b) and 59(a), Utah Rules of Civil Procedure, for a judgment notwithstanding the verdict or in the alternative for a new trial. The trial court by order denied such motion after hearing on the 29th day of May, 1975. On June 18, 1975, plaintiff filed his Notice of Appeal in this action, and the case is now before this Honorable Court pursuant to that Notice of Appeal.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN REFUSING TO GRANT PLAINTIFF'S MOTION FOR DIRECTED VERDICT AND PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE FOR A NEW TRIAL.

At the conclusion of evidence in the instant case, plaintiff moved the trial court for a directed verdict in

favor of plaintiff and against defendant which motion was denied by the court without assigning any reason for its refusal. Upon the return of the jury verdict of no cause of action, plaintiff timely moved the trial court pursuant to the provisions of Rules 50 (b) and 59(a) of the Utah Rules of Civil Procedure for a judgment notwithstanding the verdict or in the alternative a new trial. The trial court denied such motion upon hearing thereof on May 23, 1975. The refusals of the trial court to grant plaintiff's motion for a directed verdict, for judgment notwithstanding the verdict and for a new trial constituted clear error, and the error is of such magnitude as to require a reversal and a remand of this case to the trial court for a new trial or for other appropriate action.

It is well established as a matter of law that a Motion for a Directed Verdict and a Motion for Judgment N.O.V. properly lie and should be granted by the trial court in a case where there are no controverted issues of fact upon which reasonable men could differ and where, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict. Brady v. Southern Railroad, 320 U.S. 476, 64 S. Ct. 232, 88 L. Ed. 329 (1943); Shafer v. Mountain States Tel. & Telegraph Co., 335 F. 2d 444 (9th Cir. 1964); Ozark Air Lines, Inc. v. Larimer, 352 F. 2d 9 (8th Cir. 1965); Patterson v. Pizitz, Inc., 353 F. 2d 267

(5th Cir. 1965); Jopek v. New Court Central Railroad, 353 F. 2d 778 (3rd Cir. 1965); Herron v. Maryland Gas Co., 3457 F. 2d 357 (5th Cir. 1965); Adams v. Powell, 351 F. 2d 213 (10th Cir. 1965); Pinehurst, Inc. v. Schlamowitz, 351 F. 2d 509 (4th Cir. 1965); 5A Moore's Federal Practice, Sec. 50.02(1) et seq. See also, Pence v. United States, 316 U. S. 332, 62 S. Ct. 1080, 86 L. Ed. 1510 (1942) and Pollesche v. TransAmerican Ins. Co., 27 Utah 2d 430, 497 P. 2d 236 (1972).

In the leading case of Brady v. Southern Railroad, supra, the United States Supreme Court had before it the question of when and under what circumstances a Motion for a Directed Verdict is properly granted. In that landmark case, the Supreme Court announced the standard in the following terms:

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceedings by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgement notwithstanding the verdict. By such direction of the trial the result is saved from mischance of speculation over legally unfounded claims (320 U.S. at 479-480).

5A Moore's Federal Practice, Sec. 50.02(1) states the above rule in somewhat more succinct fashion:

> Although the language of the opinions concerning directed verdicts is extremely varied, it is now clear that a verdict will normally be directed where both the facts and the inferences to be drawn from the facts point so strongly in favor of one party that the court believes that reasonable men could not come to a different conclusion (At p. 2320).

It is now well established, in applying the above rule, that an appellate court, in reviewing the action of the lower court on a Motion for a Directed Verdict, must consider the evidence in its strongest light in favor of the party against whom the Motion for a Directed Verdict was made, and give him the advantage of every fair and reasonable intendment that the evidence can justify. Upon such a consideration, if the appellate court concludes that the facts adduced in evidence and the inferences to be drawn from the facts point to any conclusion so strongly that the court concludes that reasonable men could not come to a different conclusion, the appellant court is justified in overturning any ruling by the trial court on a Motion for a Directed Verdict which is adverse to or contra that required conclusion. Continental Ore Co. v. Union Carbide Corp., 370 U. S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962); Webb v. Illinois Central Railroad, 352 U. S. 512, 77 S. Ct. 451, 1 L. Ed. 503 (1957); Girardi v. Gates Rubber Co., 325 F. 2d 196 (9th Cir. 1963); Schnee v.

Southern Pacific Railroad, 186 F. 2d 745 (9th Cir. 1951); Austad v. Austad, 2 Utah 2d 49, 269 P. 2d 284.

The Utah Supreme Court has stated the above rules as follows:

> In the time-honored and universally accepted rule that a finding or a verdict must be supported by substantial evidence, the modifying adjective "substantial" has been used advisedly to indicate a higher degree of proof than just any evidence of any kind. The requirement is that the evidence must be sufficient in amount and credibility that, when considered in connection with the other evidence and circumstances shown in the case, would justify some but no necessarily all, reasonable minds acting fairly thereon, to believe it to be the truth. And conversely, if when so considered it appears to be so plainly unsubstantial or inconsequential that the court is convinced that no jury acting fairly and reasonably could so believe it, it cannot properly be regarded as substantial evidence. Utah State Road Commission v. The Steele Ranch, 533 P. 2d 888 (1975) (emphasis added)

The following observations are noteworthy about this rule:

1. The evidence must be substantial in support of the verdict or a higher degree of proof than just any evidence of any kind.

2. The evidence which supported the verdict must be considered in connection with other evidence.

3. If the evidence which supports the verdict is plainly so unsubstantial or inconsequential that the court is convinced that no jury acting fairly and reasonably

could so believe it, it cannot properly be regarded as substantial evidence and the court may reverse the jury verdict.

Applying the above cases and authority to the case at bar, it is clear that the trial court erred in refusing to grant plaintiff's motion for a directed verdict and plaintiff's motion for judgment notwithstanding the verdict. In this case, the facts adduced at trial and the inferences appropriately drawn from those facts, point so strongly in favor of the plaintiff that it is inconceivable that reasonable men, in considering those facts, could conclude other than that plaintiff was entitled to a verdict in judgment against the defendant.

NEGLIGENCE AS A MATTER OF LAW

In the instant case, the undisputed facts disclosed at trial reveal:

1. That the accident which is the subject matter of this lawsuit occurred on U. S. Highway 89 north of the Junction of 273 S. R. where the old highway between Farmington and Kaysville crosses the said highway at the hour of approximately 10:00 a.m. in the morning on January 23, 1973.

2. That defendant's truck-tractor pulling a Peterbilt lowboy tailer loaded with a D-8 Caterpillar with a detached dozer blade driver by defendant's driver, Rodney K. Bosch,

failed to stop behind the backed up traffic at that Junction, mounted the island separating the four lanes of traffic in an effort to avoid hitting the automobiles behind plaintiff's vehicle, and failing in that effort about the time that it was passing plaintiff's vehicle was thrown against the rear-end left side of the Western Gillette truck and trailers being operated by the plaintiff, Mr. Earl C. Freis. (R. pp. 1-2, 5, 55 para. 3, 81 para. 1 under first defense, Tr. pp. 43-58, 61-67)

At trial the defendant's driver, Rodney K. Bosch, made what amounts to an admission of liability and culpability in the failure to stop behind the backed up traffic when analyzed in light of the statements made by the accident reconstruction specialist, Dave Lord. Rodney K. Bosch admitted in his testimony that he saw the backed up traffic approximately three hundred feet before reaching it, (Tr. p. 422, lns. 23-30), yet he testified that he never hit his brakes until the last one hundred feet before reaching the said traffic. (Tr. p. 49, lns. 20-23) Mr. Dave Lord on the other hand testified that had the defendant's driver attempted a normal stop on dry pavement on that road under those circumstances that he could have stopped the vehicle in one hundred and twenty-five feet (125 ft.) after having taken seventy-four feet (74 ft.) indiscriminate reaction time at the speed of fifty miles per hour (50 mph). (Tr. p. 164

lns. 9-12, 176 lns. 11-24) If the total footage for reaction time and stopping the vehicle on that slope on dry pavement were totalled, it would amount to one hundred and ninety-nine feet (199 ft.) for stopping the vehicle at fifty miles per hour (50 mph) (125 ft. + 74 ft. = 199 ft.). If the defendant's driver saw the backed up traffic three hundred feet (300 ft.) away, he failed to act for one hundred and one feet (101 ft.).

The plaintiff in Benson v. Denver and Rio-Grande Western Railroad Company, 4 Utah 2d 38, 286 Pt. 2d 790 (1955) was held to be contributorily negligent as a matter of law when he drove into the side of a railroad engine at a speed of fifteen to twenty miles an hour during a snow storm in which he was only able to see for twenty-five to thirty feet at the crossing where the accident occurred. The plaintiff admitted that he knew the area and had driven it many, many times. The court held on page 44,

> "We believe all reasonable minds would agree that if plaintiff had looked he could have seen the approaching train in time to stop and avoid the collision, unless he was traveling too fast under the existing conditions to do so"

Then quoting from the rule set forth in Dally v. Midwestern Dairy Products Company, 80 Utah 133, 15 P. 2d 309, At p. 310, the court stated it was committed to the Dally court's rule, to wit,

> "In this jurisdiction the doctrine is established that it is negligence as a matter of law for a person to drive an automobile upon a traveled public highway, used by vehicles and pedestrians, at such a rate of speed that said automobile cannot be stopped within the distance at which the operator of said car is able to see objects upon the highway in front of him."

The Benson court concluded that since the plaintiff was driving fifteen miles per hour (15 mph) and could see thirty feet (30 ft.) and with a reaction time of three fourths (3/4) of a second he would travel sixteen feet (16 ft.) before applying the brakes and would need thirteen feet (13 ft.) to stop on good dry pavement and not less than eighteen feet (18 ft.) on wet roads after applying the brake and since under those circumstances it would be impossible for the plaintiff to stop short of 34.5 feet he was negligent as a matter of law for traveling at that speed. Supra at p. 44

Defendant's driver, Mr. Bosch, further admitted that he saw the patrol car about one fourth of a mile before arriving at the patrol car. (Tr. p. 47, lns. 23-30, p. 48 lns. 1-5, 9-27).

In dispute is a question of whether or not the officer was standing there doing nothing or giving hand signals. According to the testimony of Rodney Bosch, he didn't know that the officer was doing anything beyond displaying his emergency lights. (Tr. p. 408 lns. 4-20) According to the

testimony of Officer Morton who was at the scene and in the position and was in fact the one who was signaling there at the crest of the hill prior to the accident, he, Officer Morton, was giving hand signals in addition to displaying emergency lights. (Tr. p. 83 lns. 5-17)

Mr. Howell Uji Fusa was employed by the plaintiff to take pictures to show the earliest point in which traffic could be seen as well as the patrol car. Mr. Uji Fusa provided slides for the jury to see and then took corresponding pictures of the slides and had them blown up and placed on plaintiff's Exhibit Number 19. Plaintiff's Exhibit Number 15, however, is one of those pictures which is a point three tenths (3/10) of a mile prior to arriving at the point designated as the tail end of the backed up traffic. At that point one can see from viewing that picture that a great deal is visible at three tenths (3/10) of a mile prior to arriving at the point where defendant's driver had to take evasive action. (Tr. p. 102 lns. 6-15, 21-30; p. 103 lns. 1-5. Said Exhibit 15 shows the truck and the patrol car and what is between. Also see Plaintiff's Exhibit 16)

Officer John Morton further testified that he went back to the scene on April 1, 1975 and took measurements. He testified that according to his recollection of where the backed up traffic was at the time of the accident there was approximately three tenths (3/10) of a mile or about fifteen

hundred and eighty-four feet (1584 ft.) that one could see the backed up traffic before having to take evasive action. (Tr. p. 75 lns. 2-15) From the testimonies of the above referred to witnesses including the defendant's driver, it should be abundantly clear that defendant's driver, Rodney K. Bosch, is negligent as a matter of law. It's not merely from his own testimony but also from the corroborating and supplimenting testimonies of other people around. These evidences constitute a mass of credible and uncontroverted evidence that permit no other possible conclusion.

Certainly there is no evidence that the plaintiff, Mr. Earl C. Freis, was in any way negligent and contributed to his own injury, in that it remains uncontroverted that his truck was stationary and that he never knew what hit him.

On the other hand, defendant's driver, Mr. Rodney K. Bosch, admitted that he knew he had a heavier load on and that it would take a longer distance to stop and that his speed was too fast to stop in the distance required. He testified that he had experience with driving heavier loads and knew that they were harder to handle and that he was carrying approximately one hundred and twenty thousand pounds (120,000 lbs.) of gross. (Tr. p. 50 lns. 4-16; p. 52 lns. 3-6, 10-12; p. 54 lns. 6-23; p. 55 lns. 4-30; p. 56 lns. 1-30; p. 50 lns. 24-26) As the risk increases so should the duty of care. As a matter of public policy,

when a company uses the highways to transport extra heavy equipment, the risk should be borne by the company rather than the other individuals on the highway.

Merely because he was traveling within the speed limit will offer no comfort since one can commit negligence while driving within the speed limit. Lochead v. Jensen, 42 Utah 99, 129 Pt. 347. UCA 41-6-46 provides:

> 1. No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event, speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in complicance with legal requirements and the duty of all persons to use due care.
>
> 3. The driver of every vehicle shall, consistent with the requirements of subdivision(1) of this section, drive at an appropriately reduced speed when approaching and crossing an intersection or railway grade, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding road, and when special hazard exists with regard to pedestrians or other traffic or by reason of weather or highway conditions. (emphasis added)

(Also see the rule applied in Henderson v. Meyer, 533 P. 2d 290 (1975) and Weineg Brothers v. Manning, 1 Utah 2d 101, 262 P. 2d 491, 1953 5 Am.Jur. Automobiles, Sec. 167; 60A CJS Motor Vehicles, Sec. 284.)

CAUSATION AS A MATTER OF LAW

The undisputed facts disclosed at trial further reveal that the said accident which is the subject matter of this

lawsuit caused injury to plaintiff's neck. All medical testimony adduced at trial from Doctors Gary F. Larsen and Thomas D. Noonan remains credible and uncontroverted as to the causal relationship between the accident and the plaintiff's injury. Both doctors agree that plaintiff suffered an aggravation or injury which was superimposed upon an existing condition of calcium buildup or arthritis in plaintiff's neck.

The only controversy between the said doctors relates to the extent of the damage caused by the accident. Doctor Noonan on the one hand believed that plaintiff would likely have required surgery to his neck at some point in time to correct the arthritic condition irregardless of whether the accident occurred, but in the final analysis admits that that condition was aggravated by the accident. Doctor Larse on the other hand claims that because the condition was asymptomatic with no neurological signs and with only a static condition of osteophyte calcium buildup prior to the accident, then shortly after the accident neurological signs began to appear, that the accident had to have caused substantial injury or damage.(Note that Dr. Noonan agrees wi Doctor Larsen that the condition was a rather static type of

condition. Nor does Doctor Noonan dispute the fact that the accident itself must have caused significant and substantial damage.) (Tr. Doctor Gary F. Larsen p. 196 lns. 14-25; p. 197 lns. 2-4, 16-38; p. 216 lns. 1-11; p. 217 lns. 1-9; p. 233 lns. 7-27; p. 248 lns. 21-30; p. 249 lns. 1-4; p. 258 lns. 11-21. Doctor Thomas D. Noonan p. 392 lns. 9-30; p. 393 lns. 1-8; p. 375 lns. 7-19; p. 368 lns. 24-28; p. 403 lns. 17-30; p. 404 lns. 1-19. Also see Plaintiff's Exhibit 29 and Plaintiff's Exhibit 30)

The testimony of Doctor Larsen was very credible and uncontroverted by evidences adduced by the defendant. These were the statements made by the doctor concerning the real nature of plaintiff's pain. He describes as indicated above how plaintiff had complaints of pain beginning immediately after the accident and how he discovered as time went on through more objective neurological tests that the plaintiff's pains were genuine including headaches, neck pain, shoulder and arm pain, and loss of grip. (Tr. p. 196 lns. 14-25; p. 197 lns. 2-4, 16-28; p. 198 lns. 21-30; p. 199 lns. 1-9; p. 211 lns 23-30; p. 212 lns. 3-12, 19-24; p. 212 lns. 28-30; p. 213 lns. 1-3, 18-28; p. 214 lns. 3-7, 11-13)

In addition the doctor, just prior to performing the operation, performed a myelogram test wherein dye is put in the spine and watched through X-rays to discover

intrustions into the spinal canal. In this test the doctor discovered that there was in fact an intrusion in the spina canal, but due to its appearance the intrusion did not appear on the X-ray and it was concluded by the doctor to be a disk which is made of soft material which does not appear as opposed to the harder materials of calcium and bones which do appear.

If it were a disk, the doctor stated that it would be more of an acute process as compared to the more chronic problem of osteophyte buildup. (Tr. p. 226 lns. 5-24; p. 230 lns. 17-30; p. 231 lns. 2-14, 23-35; p. 232 lns. 17-23; p. 233 lns. 7-27; p. 358 lns. 11-21)

The credibility of the histories of the accident and the resulting pain taken by Doctor Gary F. Larsen and Doctor Thomas D. Noonan were reinforced by the testimonies of individuals who drove and rode with Mr. Freis before and after the accident. The first witness was James W. Dinger who had been with Mr. Freis for a period of two (2) months prior to the accident and who rode with Mr. Freis for one (1) month following the accident. It is apparent from his testimony that prior to the accident, Mr. Freis was a very productive individual who held up his end of the driving time as the two individuals, Mr. Dinger and Mr. Freis, rode together as co-drivers for Western Gillette.

Mr. Dinger testified, however, that shortly after the accident on a trip to St. Louis, Missouri, and returning therefrom Mr. Freis began to complain of headaches and requested that Mr. Dinger do the driving and from that time on through the next month until February 23rd, the relationship between the two men began to deteriorate. The reason given by Mr. Dinger was that Mr. Freis became very irritable; he began to complain of headaches and began to try to sluff off his driving on to Mr. Dinger. When the relationship deteriorated, the two men parted company by making a change through a trade of partners with another driving team. (Tr. p. 312 lns. 7-30; p. 313, lns. 1-30; p. 314 lns. 9-14; p. 311 lns. 12, 13, 16-18)

Thereafter with the new driving team Mr. Freis continued to have his problems as was testified by Mr. Courtney Bluck who remained with him during the next year. Mr. Bluck testified that Mr. Freis suffered from headaches and pains. He said that Mr. Freis tended to hold the team longer at the motels that they were staying at and began to stay at home so that Mr. Bluck had to obtain driving partners from the extra board at Western Gillette. (Tr. p. 322 lns. 23-28; p. 323 lns. 16-22; p. 324 lns. 9-26; p. 325 lns. 12-26) The testimony of these two drivers remains substantially uncontroverted by any evidence or cross-examination by the defense.

Also submitted into evidence were the records of Mr. Freis days off during 1973. A chart entitled Chronology of Mr. Freis' Driving Position was submitted into evidence setting forth the months and the changes in the driving position starting with Mr. James W. Dinger and continuing on through the year of 1975. Also a part of that chart included the accounting of Mr. Freis' time off on a month-by-month basis showing a comparison of the years 1971 through 1973.

It is apparent from that portion of the chart having to do with the time off that there was a dramatic change in Mr. Freis' work productivity between 1972 and 1973. (See Plaintiff's Exhibit Number 29) The information placed upon this chart was taken from the records kept over the years by Mr. Freis collectively designated as Plaintiff's Exhibit 30. What these records and this chart show is a dramatic change in Mr. Freis' work productivity showing that something cataclysmic occurred in January of 1973. Testimony of Mr. James W. Dinger, Mr. Courtney Bluck, and the Exhibits placed into evidence during the testimony of Mr. Earl C. Freis (Plaintiff's Exhibit 29 and Plaintiff's Exhibit 30) were substantially uncontroverted by any evidence produced by the defendant. Also from the testimon of Mr. Freis, we discover that the plaintiff was very physically active in athletics and sports prior to the

accident, but became very inactive thereafter. Pictures showing Mr. Freis' athletic involvement were Plaintiff's Exhibits 31-34. Plaintiff's Exhibits 29-34 were submitted into evidence during the testimony of Mr. Earl C. Freis. (Tr. pp. 277, 281, 282, 430)

POINT II

THE TRIAL COURT ERRED IN REFUSING TO GRANT PLAINTIFF'S MOTION FOR A NEW TRIAL

Coincident with plaintiff's Motion for Judgment N.O.V., plaintiff also filed a Motion for a New Trial which motion was also heard on the 23rd day of May, 1975. The motion for the new trial was also denied on May 29, 1975 by order of the court and without any explanation. Thereafter, plaintiff filed his Notice of Appeal on June 18 as set forth above.

During the course of the trial and cross-examination of Doctor Gary F. Larsen, defense counsel attempted to set forth a hypothet not in evidence, to wit: that at the time of the accident Mr. Freis indicated that he did not feel the impact of the defendant's truck. Plaintiff's counsel objected to the use of such evidence or statement not in evidence which was overruled pending defense counsel's ability to tie in later on. He was able to illicit out of Doctor Larsen that if plaintiff indicated no history of feeling any impact in the accident that likely he would not have been injured on the 23rd of January

1973 in the accident. (Tr. p. 235 lns. 20-30; p. 236 lns. 1-26)

Thereafter, the defense called Mr. Norval Millsap to the witness stand and put the question to him as to what was stated by the plaintiff concerning the impact of defen ant's truck. (Tr. p. 331 lns. 2-6) Before an answer was given, plaintiff's counsel requested to voir-dire the witness and thereby showed the court that the witness did not know whom was making the statements to him at the time concerning the impact of defendant's vehicle. (Tr. p. 331 lns. 9-30, p. 332 lns. 1-12)

Direct examination resumed as Mr. Berry guaranteed that he would be able to put it together. Counsel again failed to illicit from Mr. Millsap as to whom he was talki to. Again Mr. Barnes objected to the admission of the testimony stating that there was no proper foundation necessary to know specifically as to whom was speaking. Mr. Berry then stated that at the time of the declaration if the plaintiff did not object to the statement being mad by Mr. Dinger he automatically adopts whatever is said. M Barnes disagreed saying that two people in a general locat while one is speaking need not speak in order to be on a differing opinion. The court agreed and sustained plaintiff's objection.

Again Mr. Berry tried as he asked what was said by Mr. Dinger. The witness stated that he was not sure. Then again Mr. Berry asked about what was said about the collision by Mr. Freis and again the witness said he was not sure which one made any statements. Again Mr. Barnes objected. Again the witness stated that he couldn't specifically remember with whom he was carrying on the conversation.

The court warned that if the witness could not recall who was speaking to him that the testimony could not be used on the area. Again Defense Counsel attempted to speak generically about what the two, Mr. Dinger and Mr. Freis, were saying by using the word "they". Mr. Barnes again objected to the use of the word "they" insisting that who is speaking must be specified. The court agreed whereupon Mr. Berry asked that the jury be excused for a minute.

While the jury was recessed, counsel proffered evidence of the statement. The witness stated that he could not honestly recall which one of them made the statement and testified about the conversation as follows: He, Mr. Millsap, had said, "'I guess you got shook up pretty bad' or something to that effect,'When the truck--other truck hit,' and one of them replied, 'We didn't--I didn't even feel the truck hit. All I heard was a lot of racket. I looked out the window and there went the mirror,'" (Note

that this statement was not a statement of a witness where a party is being identified as having stated it, but is merely a statement of a person at the scene of the acciden designated as "I") Again the witness stated that he didn' know who had made the statement. Mr. Barnes protested tha because the person can't be identified it becomes very prejudicial.

The court stated that if Mr. Freis had made the state ment, it would be an admission of a party. If Mr. Dinger said it it would be hearsay stating, "That's the way I see it Mr. Berry. I don't know how else I can look at it.' Mr. Berry continued concerning his theory of adoption by not denying it and threatened that if it were not let in it would be grounds for a new trial. The court stated tha it was not afraid of those grounds.

The court then suggested that Mr. Dinger be called and be asked if he had said it, whereupon Mr. Dinger was returned to the witness stand and direct examination began Mr. Dinger in answer to the question put said, "I said nothing to Millsap about the mirror and I don't recall Mr. Freis saying anything." Mr. Berry argued that he had elim nated Mr. Dinger and that left Mr. Freis as the declarant.

The court rejected that argument, but asked Mr. Barne: if he didn't want something of error in the record. Mr.

Barnes asked that it not be left for him to appeal upon. Mr. Berry then insisted that he could provide authority on the question, whereupon counsel retired with the court to chambers and attempted to find some authority. During the course of the recess, Mr. Berry failed in his effort to obtain the necessary authorities as is set forth in the affidavit of plaintiff's counsel in support of the Motion for a New Trial. (At R. p. 169-170)

During the recess and after the argument in chambers, defense counsel still refused to accept the court's ruling. The court, however, in chambers promised that if Mr. Millsap could be reasonably certain as to who was making the statement it would be let in. Defense Counsel then approached Mr. Millsap in the hall and instructed him as to what he must say on the witness stand informing him that it would only be necessary for him to conclude that since Mr. Dinger had denied in his testimony that he was the declarant that he could therefore reasonably place the statement as one having been made by Mr. Freis. (R. p. 170 para. 8)

Thereafter the court resumed session and the witness, Mr. Norval Millsap, was returned to the witness stand. As the questions were again asked Mr. Barnes again objected whereupon the court asked the witness if he was reasonably certain who it was that had replied to him with regard to the conversation. The witness stated, "Based upon Mr.

Dinger's statement, yes, sir." The court then overruled plaintiff's objection and directed counsel to go ahead. Whereupon, the witness answered, "I am reasonably certain that Mr. Freis stated that when I asked him if it didn't shake him up when the truck hit him and he replied, 'I didn't feel the thing hit. I just heard a lot of racket, looked out the window and there went the mirror.'" (Tr. pp. 331-343 ending on line 28)

A very brief study of the record will show that Mr. Millsap was mistaken in that both Mr. Freis in his testim before the jury and Mr. Dinger in his testimony denied having talked to Mr. Millsap concerning any part of the collision or the impact of defendant's truck. The final testimony given by Mr. Millsap lacked a proper foundation because he stated, "Based upon Mr. Dinger's statement, ye sir." I would remind the court that Mr. Dinger's stateme was not made before the jury, but was made during recess the jury and therefore an improper foundation was made. That places the whole thing back where it started from. As the court reasoned on p. 337 lns. 16-19 If Mr. Freis made the statement, it would be an admission of the party and therefore, an exception to the hearsay rule. If Mr. Dinger, however, made the statement it would be hearsay because it would be an out-of-court statement which is ma other than by a witness while testifying at a hearing

which is being offered to prove the truth of the matter asserted. (See rule 63 of the Rules of Evidence adopted by the S. Ct. of Utah February 17, 1971 p. 39. See testimonies given by Mr. Freis and Mr. Dinger in which both denied having discussed the impact with Mr. Millsap p. 343 lns. 14-15; p. 339 lns. 7-10; p. 302 lns. 17-18)

Doctor Thomas D. Noonan after giving a very similar history concerning plaintiff's injury to that of Doctor Gary F. Larsen was asked what his opinion as to the cause of plaintiff's condition would be if Mr. Millsap testified and indicated that Mr. Freis had stated at the time of the accident that he hadn't even felt the impact of the collision. The doctor testified that it would indicate to him that Mr. Freis had not suffered any injury at the time and that Mr. Freis' condition is a result of the chronic condition of arthritis. (Tr. p. 402 lns. 8-16)

Obviously the use of Mr. Millsap's testimony and the admission of the said testimonies over plaintiff's objection was very prejudicial in this case in that it would tend to negate the histories reported by the doctors concerning the accident and the effect thereof. Since Mr. Millsap could not identify the declarant and since it was possible that the two individuals, Mr. Freis and Mr. Dinger, could have experience the impact differently, the admission of Mr.

Millsap's testimony was crucial to the outcome of the case.

Mr. Freis was sitting behind the driver's wheel with his back to the door and corner that received the most impact as indicated on Exhibit D-23 in a relaxed position, (Tr. p. 188 lns. 21-30; p. 189 lns. 1-17), while Mr. Dinge was in a very rigid braced situation stretched out attempt to put his pants on. (Tr. p. 309 lns. 23-30) The experie of the two men could have been entirely different under tl circumstances.

The failure to lay the proper foundation prohibited the questions put to Millsap because:

1. The situation may not have called for a reply, o

2. There was no evidence that the plaintiff heard o understood such a statement, or,

3. The plaintiff was not aware at the time that he had an interest in the statement being made because the onset of pain did not begin immediately, or,

4. He was not in the physical or mental position tc deny such a statement since he felt no immediate effects at the time the statement was being made.

Before defendant can use silence as an admission he must first prove one of the above which he did not do.

> On the other hand, no admission can be implied from silence where the failure to answer was caused by constraint, or where the party was not aware at the time he had an interest, or was only indirectly affected, or where when the matter was presented he had no interest to object. 31A C.J.S. Evidence, Sec. 295 p. 757
>
> The doctrine of adoptive silence does not apply if the party is in such physical or mental condition that a reply could not be reasonably expected from him. Southers v. Savage, 191 C.A. 2d 100, 12 Cal. Rptr. 470. See also Smith v. Beard 56 Wyo. 375, 110 P. 2d 260.

That these type of inquires are preliminary and necessary in the foundation of such questions is supported by the following:

> Statements made by a party may be proved by other witnesses when such statements are against the party's interest, but if it is thus sought to impeach a party, a proper foundation must be laid for the impeaching questions. Kitchel v. Gallagher, 126 Or. 373, 270 P. 488
>
> The admissibility of a tacit admission allegedly arising from the silence of a person concerning a statement made in his presence and hearing is dependant upon whether the circumstances surrounding the making of the statement were such as to naturally cause for denial which is a preliminary question for the trial court to be determined in view of all the evidences in the case. 29 Am Jur 2d, Evidence, Sect. 636 p. 689. Also see Klever v. Elliott, 212 Or. 490, 320 P. 2d 263, 70 A.L.R. 2d 1094

Very basic, however, is the fact that before a statement can be admissible against a party that party must be identified as the declarant.

> In any event, before a purported statement of a party is admissible against him, it is

necessary to identify the declarant as the party. . .Kunk vs. Howell, 40 Tenn. App. 183, 289 S.W. 874, 73 A.L.R. 2d 1304.

CONCLUSION

The trial court erred in refusing to grant plaintiff's Motion for a Directed Verdict, Motion for a Judgment N.O.V., or in the Alternative for a New Trial. Moreover, the verdict of the jury in the case was against the weight and preponderance of the evidence and clearly erroneous. The trial court further erred in admitting into evidence the testimony of Mr. Norval Millsap without a proper foundation being laid in that the said statement fortified the hypothetical questions and responses being put by Mr. Berry throughout the trial to Doctor Gary F. Larsen and Doctor Thomas D. Noonan. This Court should reverse the judgment of the trial court and remand the case to the district court for appropriate proceedings.

Respectfully submitted,

Lyle J. Barnes

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Attorney for Appellant

C E R T I F I C A T I O N

I hereby certify that I served the foregoing Brief by ~~mailing~~ delivering a true copy thereof, ~~postage prepaid~~ to Raymond M. Berry, Attorney for Respondent, 700 Continental Bank Bldg. Salt Lake City, Utah 84101 this 14th day of November, 1975.

Lyle J. Barnes

JoAnn P. Knowles
Secretary